Public Prosecutor v Muhammad Fiqry bin Jafri & Anor

HIGH COURT (MUAR) — CRIMINAL APPEAL NO JB-41H-24–08 OF 2020
AWANG ARMADAJAYA JC
5 JANUARY 2021

Criminal Procedure — Appeal — Appeal against sentence — Bond of good behaviour — Whether sentence imposed by learned trial judge was appropriate — Voluntarily causing hurt — Pleaded guilty — Criminal Procedure Code s 173A — Penal Code s 323

This was an appeal by the public prosecutor against the decision of the learned magistrate who imposed an order pursuant to s 173A of the Criminal Procedure Code on the respondents. The respondents were charged under the offence of s 323 of the Penal Code. The respondents pleaded guilty and were ordered to enter, without recording a conviction, a bond of good behaviour under s 173A of the Criminal Procedure Code ('the Code') for a period of two years with a bond of RM2,000 each with a surety. The appellant was dissatisfied with the order, appealed against the said order. The issue was whether an order under s 173A of the Criminal Procedure Code was appropriate on the facts and circumstances of the case. At about 1.30pm on that day, one Zarina bt Abu Talib went to the complainant's house to apologise for a road collision but was met with words of abuses. Zarina left the complainant's house to return on her own. Zarina was met by both respondents who were her children and they went back to the complainant's house to tender the apology again. Upon reaching the house, the complainant took a piece of wood and tried to hit Zarina but was prevented by the first respondent. The second respondent came from behind the complainant and released a punch but the complainant ducked and the punch landed on the complainant's wife. Both the complainant's wife and the complainant fell onto the floor. The complainant shouted that his arm was broken. The complainant's wife then left the house to lodge a police report.

Held, dismissing appellant's appeal and affirming decision of magistrate court:

(1) After the court decided that a conviction should be made, the court must pronounce the conviction. It would have the effect of changing an accused person to be a convicted one. The pronouncement was necessary although the failure to do so did not vitiate the conviction because it was curable pursuant to s 425 of the Criminal Procedure Code. The court was of the view that the formula 'shall be punished with imprisonment' did not remove the discretion to apply s 173A of the Code. It was found that no appealable error that warranted appellate intervention. A

compensation cost of RM50 on each respondent was imposed for the payment to the complainant on account of the injuries sustained (see paras 22, 42, & 62–63) .

(2) The respondents pleaded guilty before the trial started. Judicial time and expenses were saved. This court found in the mitigation that not only were the two offenders young but they were defending their mother from the complainant. Yes, they went overboard but they were not overwhelmingly aggressive but in a manner sufficient to secure safety. It does not fall within private defence when a person goes over the necessary force to secure safety but who are we to say as against the judgment call of the respondents during the tense moments when the complainant was attacking the mother of the two respondents. The complainant was not as innocuous as he had made out to be. The harsh words, threats of violence and inconsiderateness were certainly unwarranted and it amply balanced off the injuries sustained as well as the charge proffered by the public prosecutor against the respondents. The mitigation forwarded by the respondents was that they were remorseful and had promised not to repeat the offence again. There was nothing more that a court can ask for than an offender to turn over a new leaf and become a better person. Taking into account the complainant's medical report, the medication prescribed to the complainant were painkillers and not for treatment of injuries per se. No other medication was prescribed. Although the injuries sustained may be painful at times, they were not as serious as alleged by the complainant (see paras 49–54 & 57).

(3) The court found no appealable error that warranted appellate intervention. The court made slight variation in the order of magistrate court in that a compensation of RM50 was imposed on respondent to be paid into court and court would pay the said sum to the complainant on account of the injuries sustained (see paras 62–63).

(4) The court affirmed decision of magistrate in ordering the two respondents to enter a bond of good behaviour for a term three years to run from the date of the incident (see para 64).

[Bahasa Malaysia summary

Ini adalah rayuan oleh pendakwa raya terhadap keputusan tuan majistret yang bijaksana yang telah mengenakan perintah menurut s 173A Kanun Tatacara Jenayah ke atas responden. Responden telah dituduh atas kesalahan di bawah s 323 Kanun Keseksaan. Responden mengaku bersalah dan diperintahkan untuk memasukkan, tanpa merekodkan sabitan, bon berkelakuan baik di bawah s 173A Kanun Tatacara Jenayah ('Kanun tersebut') selama tempoh masa dua tahun dengan jaminan RM2,000 dengan seorang penjamin. Perayu tidak berpuas hati dengan perintah tersebut, telah merayu terhadap perintah tersebut. Isu adalah sama ada perintah di bawah s 173A Kanun Tatacara

Jenayah adalah bersesuaian dengan fakta dan keadaan kes. Pada kira-kira pukul 1.30 petang hari tersebut, seorang Zarina bt Abu Talib telah pergi ke rumah pengadu untuk memohon maaf atas kemalangan jalan raya tetapi disambut dengan kata-kata kesat. Zarina meninggalkan rumah pengadu untuk pulang dengan sendirinya. Zarina ditemui oleh kedua-dua responden yang merupakan anak-anaknya dan mereka kembali ke rumah pengadu untuk membuat permohonan maaf sekali lagi. Semasa sampai, pengadu telah mengambil sebatang kayu dan cuba memukul Zarina tetapi dihalang oleh responden pertama. Responden kedua datang dari belakang pengadu dan melepaskan tumbukan tetapi pengadu mengelak dan pukulan mengenai isteri pengadu. Kedua-dua isteri pengadu dan pengadu jatuh ke lantai. Pengadu menjerit bahawa lengannya patah. Isteri pengadu kemudian meninggalkan rumah untuk membuat laporan polis.

Diputuskan, menolak rayuan perayu dan mengekalkan keputusan mahkamah majistret:

(1) Setelah mahkamah memutuskan bahawa suatu sabitan harus dibuat, mahkamah harus menjatuhkan sabitan tersebut. Ini akan memberikan kesan menukar orang yang dituduh untuk menjadi orang yang disabitkan. Sabitan tersebut adalah perlu walaupun kegagalan untuk melakukannya tidak mencacatkan sabitan tersebut kerana ia dapat dibaiki berdasarkan s 425 Kanun Tatacara Jenayah. Mahkamah berpendapat bahawa formula 'akan dihukum penjara' tidak membatalkan budi bicara untuk mengguna pakai s 173A Kanun tesebut. Ia telah didapati bahawa tidak ada kekhilafan merayu yang yang memerlukan campur tangan mahkamah rayuan. Kos pampasan sebanyak RM50 untuk setiap responden dikenakan untuk pembayaran kepada pengadu kerana kecederaan yang dialami (lihat perenggan 22, 42, & 62–63).

(2) Responden telah mengaku bersalah sebelum perbicaraan bermula. Masa dan perbelanjaan kehakiman dijimatkan. Mahkamah ini mendapati dalam mitigasi bahawa bukan sahaja kedua-dua pesalah tersebut muda tetapi mereka juga mempertahankan ibu mereka daripada pengadu. Ya, mereka berkelakuan melampau tetapi mereka tidak terlalu agresif tetapi dengan tingkah laku yang cukup untuk menjamin keselamatan. Ia tidak termasuk dalam pertahanan persendirian apabila seseorang menggunakan kekuatan yang diperlukan untuk menjamin keselamatan tetapi siapa yang harus kita katakan sebagai menentang panggilan penghakiman responden pada saat-saat tegang ketika pengadu menyerang ibu dua responden tersebut. Pengadu tidaklah tidak berbahaya seperti yang beliau katakan sebelumnya. Kata-kata kasar, ugutan keganasan dan tidak bertimbang rasa bukanlah suatu alasan dan ini cukup untuk mengimbangi kecederaan yang dialami serta tuduhan yang dikemukakan oleh pendakwa raya terhadap responden. Mitigasi

yang disampaikan oleh responden adalah bahawa mereka menyesal dan berjanji untuk tidak mengulangi kesalahan tersebut lagi. Tidak ada yang lebih boleh diminta oleh mahkamah ini daripada tertuduh insaf dan menjadi orang yang lebih baik. Dengan mengambil kira laporan perubatan pengadu, ubat-ubatan yang diberikan kepada pengadu adalah ubat penahan sakit dan bukanlah untuk merawat kecederaan khususnya. Tiada ubat lain yang diberikan. Walaupun kecederaan yang dialami kadang-kadang menyakitkan, ianya tidak begitu teruk seperti yang didakwa oleh pengadu (lihat perenggan 49–54 & 57).

(3) Mahkamah tidak mendapati bahawa ia kekhilafan rayuan yang memerlukan campur tangan mahkamah rayuan. Mahkamah melakukan sedikit perubahan dalam perintah mahkamah majistret di mana pampasan sebanyak RM50 dikenakan kepada responden untuk dibayar ke mahkamah dan mahkamah akan membayar jumlah tersebut kepada pengadu kerana kecederaan yang dialami (lihat perenggan 62–63).

(4) Mahkamah mengekalkan keputusan tuan majistret dengan memerintahkan kedua-dua responden memasukkan bon berkelakuan baik untuk tempoh masa tiga tahun dari tarikh kejadian (lihat perenggan 64).]

Cases referred to

A Child v PP (and another appeal) [2020] 8 AMR 343 (refd)
Badri bin Abas, Re [1971] 1 MLJ 202 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83; [1981] 1 LNS 139, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193; 2004 3 CLJ 737, FC (refd)
Goh Siew Wah v Pendakwa Raya [2003] MLJU 692; [2004] 1 AMR 616, HC (refd)
Jayanathan v PP [1973] 2 MLJ 68, FC (refd)
Liow Siow Long v PP [1970] 1 MLJ 40 (refd)
PP v Azhar Che Wil & Ors and another case [2006] 6 AMR 254 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Morah Chekwube Chukwudi [2017] MLJU 958; [2017] AMEJ 0782, CA (refd)
R v Sargeant [1974] 60 Cr App R 74, CA (refd)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)
Zaidon bin Shariff v PP [1996] MLJU 159; [1996] 4 CLJ 441, HC (refd)

Legislation referred to

Child Act 2001 s 91, 91(1)(a), (1)(b)
Criminal Procedure Code ss 52B, 173, 173(m)(ii), 173A, 173A(1), (4), 294, 425

Domestic Violence Act 1994 s 2
Penal Code ss 34, 130TA, 323, 353

Mustaqim bin Sukarno (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Velaithan a/l Koran (Vela Koran & Co) for the first and second respondents.

Awang Armadajaya JC:

INTRODUCTION

[1] This is an appeal by the public prosecutor against the decision of the learned magistrate who imposed an order pursuant to s 173A of the Criminal Procedure Code, on the two respondents, given on 14 July 2020 in Kluang.

[2] The two respondents were charged at the instance of public prosecutor and the charge is as follows:

(English translation)

> That you together on 23 January 2018 at about 2 pm at a house No 4, Jalan Ria 5, Taman Ria, Sri Lalang Kluang, in the District of Kluang, in the State of Johor voluntarily caused injury on one Abdul Mutallib bin Rohani (NRIC No 680623–01–6503) and you thereby committed an offence under section 323 Penal Code, which is punishable under the same, and to be read with section 34 Penal Code

[3] The two respondents pleaded guilty and were ordered to enter, without recording a conviction, a bond for good behaviour under s 173A of the Criminal Procedure Code for a period of two years with a bond of RM2,000 each with a surety.

[4] The public prosecutor, being dissatisfied with the order of the learned magistrate, appealed against the said order.

BACKGROUND FACTS

[5] On the 23 January 2018, at about 1pm, one Zarina bt Abu Talib was driving a Proton Exora car with the registration number JNK668 on a small lane at Taman Ria, there was a motorcycle from the opposite direction crossed path with her car. On the motorcycle were a man, woman and a child. Zarina was in a hurry and was driving rather fast.

[6] To avoid a collision, Zarina swerved to the left and the motorcyclist swerved to the right. She was in a hurry, to get her medication from Pos Laju, a courier service provider company. As she drove away, she noticed that the

motorcyclist was chasing her car and tried to stop her car. The motorcyclist, a male adult (later who became the complainant in our instant case) was screaming against her. She stopped and asked for his home address to apologise later.

[7] At about 1.30pm that day, Zarina went to the house of the motorcyclist to apologise but was met with words of abuses. She left the complainant's house to return to her own and she was met by the two respondents who are her children and together they went back to the complainant's house to tender their apology again. On reaching the house, the complainant took a piece of wood and try to hit Zarina but was prevented by Fiqry. Upon seeing this, Fahry came from behind the complainant and released a punch on the complainant but the complainant ducked and the punch landed on the complainant's wife and both the complainant's wife and himself fell onto the floor. The complainant shouted that his arm was broken. The complainant's wife then left the house to lodge a police report.

[8] At 5.30pm the same day, two police personnels came to the house of the two respondents and asked for them. Zarina told the police personnel that the two respondents are not at home and the police personnel requested Zarina to inform the two respondents to surrender themselves at the police station on the suspicion of attacking a Malay male.

[9] Meanwhile the complainant seek treatment at the Enche Besar Hajjah Khalsom Hospital in Kluang.

[10] Zarina lodged a police report which was received and tendered in court during the hearing of the appeal and marked as P8. Meanwhile the learned counsel for the respondents tendered the medical report of the respondent Muhammad Fiqry bin Jafry which was marked as P7.

THE ISSUE IN THIS APPEAL

[11] There is only one issue which is whether an order under s 173A of the Criminal Procedure Code is appropriate in the facts and circumstances of this case.

[12] When the court finds that an accused person is guilty of an offence as per the charge or the amended charge, the court may either convict him on the said charge and sentenced him according to law.

[13] In *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315, His Lordship Justice Mohamed Azmi observes as follows:

A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused. (Emphasis added.)

[14] On the same principle, His Lordship judicial commissioner Augustine Paul (as h then was) in *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441 held as follows:

The phrase 'pass according to law' in the subsection adverted to means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see Re Chang Cheng Hoe & Ors [1966] 2 MLJ 252, *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315; [1981] 1 LNS 28 and *Philip Lau Chee Heng v Public Prosecutor* [1988] 3 MLJ 107; [1988] 2 CLJ Rep 144). *The right to determine the quantum of punishment on a guilty party is absolutely in the discretion of the trial court. It will exercise that power judicially and will not tolerate any encroachment or even semblance of encroachment by either the prosecution or the defence in respect of that right.* (Emphasis added.)

[15] In the event that the court considers an order under s 173A of the Criminal Procedure Code is appropriate, let us discuss the requirements of the said provision.

[16] I reproduced the provision of s 173A of the Criminal Procedure Code for ease of reference.

173A Power to discharge conditionally or unconditionally

(1) Notwithstanding anything contained in section 173, the Court shall have the powers contained in this section.

(2) *When any person is charged before the Court with an offence punishable by such Court, and the Court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, the Court may, without proceeding to record a conviction, make an order either*:

(a) *dismissing the charge or complaint after an admonition or a caution to the offender as the Court seems fit; or*

(b) *discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time*

during such period, not exceeding three years, as may be specified in the order.

(3) The Court may, in addition to any such order, order the offender to pay compensation for injury or for loss (not exceeding the sum of fifty ringgit) or to pay the costs of the proceedings as the Court thinks reasonable or to pay both compensation and costs.

(4) An order under this section shall for the purpose of revesting or restoring stolen property, and of enabling the Court to make such order as to the restitution or delivery of property to the owner and as to the payment of money upon or in connection with the restitution or delivery, have the like effect as a conviction for an offence committed in respect of such property.

(5) If the Court is satisfied by information on oath that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his apprehension.

(6) Any offender when apprehended on any such warrant shall, if not immediately brought before the Court having power to sentence him, be brought before a Magistrate who may:

(a) either remand him by warrant until the time at which he is required by his bond to appear for judgment or until the sitting of a Court having power to deal with his original offence whichever shall first happen; or

(b) admit him to bail with a sufficient surety conditioned on his appearing for judgment.

(7) The offender when so remanded may be committed to prison and the warrant of remand shall order that he shall be brought before the Court before which he was bound to appear for judgment or to answer as to his conduct since his release.

(8) This section shall not apply:

(a) if the offender is charged with a serious offence; or

(b) if the offender is charged with the commission of an act of domestic violence as defined under section 2 of the Domestic Violence Act 1994.

[17] Section 173A overrides s 173 of the Criminal Procedure Code. This is given by the ouster clause in sub-s (1) which reads 'Notwithstanding anything contained in s 173, the court shall have the powers contained in this section'.

[18] In *Public Prosecutor v Morah Chekwube Chukwudi* [2017] MLJU 958; [2017] AMEJ 0782 the Court of Appeal enumerated circumstances that may invite the application of s 173A:

[5] It is well established that there are a number of factors that courts take into consideration before sentencing. Some of them are as follows: *(a) the gravity or*

severity of the facts constituting the offence; (b) the circumstances in which it was committed; (c) the rampancy of such offence in the area; (d) the offender's previous record; (e) the offender's contribution and support to his family members; (f) the offenders means; (g) the effect of conviction and sentence on his job opportunities; (h) the age and health of the accused; (i) whether it is his first offence; (j) whether the accused had cooperated with the police after the commission of the offence; (k) whether the accused had pleaded guilty; (i) status of the accused; (m) whether there was violence during the crime; (n) public interest, etc.

[6] *All these factors where applicable need to be addressed by the defence to secure a just sentence. It is equally important for the prosecution to rebut the facts adduced by the accused if they are not bona fide, as ultimately the power to sentence is placed on the trial judge and the judge had to rely on the facts adduced in court …*

[19] The matters that are to be considered before embarking on applying the provision are as follows (but not limited to them only):

(a) there must be a charge against the accused person for which the court has both the legal and territorial jurisdiction to hear;

(b) the charge must be proven either by an unqualified and unequivocal plea of guilty or by evidence beyond all reasonable doubt;

(c) there is a finding of guilt but no conviction is recorded against the accused person;

(d) having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, *or* to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or that it is expedient to release the offender on probation;

(e) the court may *EITHER*:

(i) dismissing the charge or complaint after an admonition or a caution to the offender as the court seems fit; *OR*

(ii) discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order.

[20] The overriding provision may be enumerated as follows (but not limited to them):

No	Section 173	Section 173A
1	(b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the court shall pass sentence according to law: ... (j) (i) If the accused pleads guilty to the charge as amended, the plea shall be recorded and he may be convicted on it and the court shall pass sentence according to law: ... (m) (ii) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it and the court shall pass sentence according to law:	(2) ... and the court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, the court may, without proceeding to record a conviction, make an order either:

[21] In s 173 (in the various provisions as enumerated as above), there is a finding of guilt either after a plea of guilty or finding that a case beyond reasonable doubt has been made out against the accused person. For completeness sake, it must be mentioned that s 173(m)(ii) has made the finding of guilt upon the strength of evidence but made the convicting of a person charged an option. Hence the phrase 'If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty ...' and subsequently the court *MAY convict* the accused person. One of the reasons is to give the option of acting pursuant to the provisions of s 173A.

[22] After the court decided that a conviction should be made, the court must pronounce the conviction. This, would have the effect of changing an accused person to be a convicted one. Hence such a pronouncement is necessary although the failure to do so, does not vitiate the conviction because it is curable pursuant to s 425 of the Code. After which, sentence according to law may be passed.

[23] On the other hand, under s 173A, the court after finding that the charge (against the accused person) has been proved, the court may, *without proceeding to record a conviction*, make an order either:

(a) dismissing the charge or complaint after an admonition or a caution to the offender as the court seems fit; or

(b) discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order.

[24] In addition to the orders in (a) and (b) above, the court may, order the offender

(a) to pay compensation for injury or for loss (not exceeding the sum of 50 ringgit); or

(b) to pay the costs of the proceedings as the court thinks reasonable; or

(c) to pay both compensation and costs.

[25] For property crimes, the purpose of revesting or restoring stolen property, and of enabling the court to make such order as to the restitution or delivery of property to the owner and as to the payment of money upon or in connection with the restitution or delivery, have the like effect as a conviction for an offence committed in respect of such property.

[26] Hence in property crimes, any order for restitution of property to the lawful owner or payment of such sum of monies for the purpose of restitution would, in the words of the s 173A(4) 'have the like effect as a conviction for an offence committed in respect of such property'.

[27] It must be remembered that an order pursuant to s 173A does not in any way let scot free, the offender (be he a major or a minor). It is a suspended sentence because of the remaining provisions which reads as follows:

> (5) If the Court is satisfied by information on oath that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his apprehension.
>
> (6) Any offender when apprehended on any such warrant shall, if not immediately brought before the Court having power to sentence him, be brought before a Magistrate who may:
>
> (a) either remand him by warrant until the time at which he is required by his bond to appear for judgment or until the sitting of a Court having power to deal with his original offence whichever shall first happen; or

(b) admit him to bail with a sufficient surety conditioned on his appearing for judgment.

(7) The offender when so remanded may be committed to prison and the warrant of remand shall order that he shall be brought before the Court before which he was bound to appear for judgment or to answer as to his conduct since his release.

[28] If the offender failed to observe any of the conditions of his bond, the court that has the power to sentence him for the original sentence (for which he was charged earlier) and may issue a warrant for his apprehension, where in the case of any other court that has the power to sentence him for the original sentence, either remand him by warrant until the time at which he is required by his bond to appear for judgment at the sitting of a court having power to deal with his original offence, or the court (which is any other court that has the power to sentence him for the original sentence) admit him to bail with a sufficient surety conditioned on his appearing for judgment before the court having power to deal with his original offence.

[29] It must be remembered that the judgment here is not just the original offence to be punished but also the failure to comply with the conditions of the bond of good behaviour. The court had earlier, was satisfied by information on oath that the offender has failed to observe any of the conditions of his bond before issuing the Warrant for his apprehension. The offender bears the burden of proving his justification of his failure of compliance with the conditions of the bond why he should not receive any penalty for: (a) failing to observed the conditions of the bond; and (b) after having given a second chance of not having a conviction recorded against him or suffer the sentence in accordance with law, the offender opt to violate the conditions of his bond.

[30] I would like to say, that s 173A must never be used to lure a person who is under a bond of good behaviour pursuant to the provision, to commit any violation of the conditions of the bond and afterwards complaints be made to the court that the offender has committed a breach of the condition. I should think such a person and his efforts is tainted with malice to entice non-compliance and complained it later to the court. This is to ensure the offender suffers penalty. It is, in my view, an entrapment with malicious intent, no less. If the offender succeeds in showing that the above situation happened, then it must be taken that the non-compliance did not happen.

[31] In *Re Badri bin Abas* [1971] 1 MLJ 202 His Lordship Justice Sharma elucidated on the considerations in applying s 173A of the Criminal Procedure Code:

> Section 173A, *I think, is primarily aimed at dealing leniently with first offenders who are not guilty of offences which are not so serious by giving such persons a chance of reformation which they would lose if they were sent to prison. A person convicted of an*

offence cannot, however, as of right claim the benefit of s 173A. The exercise of the power is entirely in the discretion of the court and can only be exercised according to the circumstances of each case. *The legislature has very clearly enumerated that the age, character, antecedents of the offender, the circumstances in which the offence was committed, the physical or mental condition of the offender, the trivial nature of the offence if it be so, or other extenuating circumstances under which the offence was committed should be taken into consideration while exercising the discretion under this section. An exercise of discretion under this section requires a considerable sense of responsibility and courts should not allow themselves to be misled into applying this section by any misplaced sense of leniency or sympathy. The public must not be led to suppose that any offender may commit any crime without any fear of punishment. If there are circumstances which indicate that the accused had succumbed to a sudden temptation, or the offence committed by him was committed only as a result of a sudden uncontrollable impulse, or it was the result of sheer thoughtlessness, it may afford some reason to exercise discretion under* s 173A. These are quite a few of the considerations which may be taken into account. The list can never be exhaustive. There may be innumerable situations and circumstances depending on the facts of a particular case and it is upon those circumstances that the court should exercise its proper judgment.

[32] What His Lordship has said is that:

(a) s 173A is primarily aimed at dealing leniently with first offenders who are not guilty of offences which are not so serious by giving such persons a chance of reformation which they would lose if they were sent to prison (an example is a record of conviction will effectively prevent many from a position in the government or in some sectors in the private industries);

(b) a person convicted of an offence cannot, however, as of right claim the benefit of s 173A;

(c) the legislature has very clearly enumerated that the age, character, antecedents of the offender, the circumstances in which the offence was committed, the physical or mental condition of the offender, the trivial nature of the offence if it be so, or other extenuating circumstances under which the offence was committed should be taken into consideration while exercising the discretion under this section;

(d) an exercise of discretion under this section requires a considerable sense of responsibility and courts should not allow themselves to be misled into applying this section by any misplaced sense of leniency or sympathy and under no circumstance the public is to be led to suppose that any offender may commit any crime without any fear of punishment; and

(e) if there are circumstances which indicate that the accused had succumbed to a sudden temptation, or the offence committed by him

was committed only as a result of a sudden uncontrollable impulse, or it was the result of sheer thoughtlessness, it may afford some reason to exercise discretion under s 173A.

I think this is one of those circumstances where it should be applied.

[33] We must keep in mind, that s 173A itself excludes certain offences from being considered. This is not an ouster clause but rather it reflects the true intention of legislature in deciding what are serious offences that merits harsher treatment which society demands.

[34] These are:

(a) if the offender is charged with a serious offence; or

(b) if the offender is charged with the commission of an act of domestic violence as defined under s 2 of the Domestic Violence Act 1994; and

(c) an offence where s 173A of the Criminal Procedure Code has been expressly excluded.

[35] In *Public Prosecutor v Azhar Che Wil & Ors and another case* [2006] 6 AMR 254 it was held that:

> [9] What is the rationale for certain criminal offence to be classified as compoundable? Out of the 500 odd offences under the Penal Code, only 23 offences are compoundable. In the textbook, *Hamid's On Criminal Procedure* (2nd Ed) at p 561, the author wrote: *The basis of classification of offences compoundable with the sanction of the court, and offences not compoundable at all is the degree of wrong done to the State by the commission of the offence.*

[36] In the book *Hamid Ibrahim (1994). Hamid's Criminal Procedure* (1st Ed) Kuala Lumpur: Denning's Book Centre at p 599 the learned author has explained the following:

> Petty wrongs done to citizens which do not seriously affect the interest of the community or the State are compoundable by the injured party without reference to State ...

[37] 'Serious offence' here is defined as 'an offence punishable with imprisonment for a term of ten years or more' (see s 52B of the Criminal Procedure Code).

[38] Other laws such as some provisions in the Penal Code have also excluded some offences from being considered when passing sentence such as s 130TA of the Penal Code which stipulates:

130TA Non-application of Offenders Compulsory Attendance Act 1954 and sections 173A, 293 and 294 of the Criminal Procedure Code

The Offenders Compulsory Attendance Act 1954 [Act 461] and sections *173A*, 293 and 294 of the Criminal Procedure Code *shall not apply to an offence under this Chapter*.

[39] There are other laws too but I have no intention of producing each and every provision. Suffice that I say, if a law excludes the operation of s 173A of the Criminal Procedure Code, then it is must not be put into consideration for the purpose of sentencing.

[40] But it must be clearly spelt out or otherwise should all the conditions precedent of s 173A of the Criminal Procedure Code have been fulfilled, the trial court, having the jurisdiction to hear and sentence, may consider it.

[41] For the record, s 173A of the Criminal Procedure Code must be pleaded and proved from the facts. A magistrate hearing a case, need not consider s 173A if it is not pleaded unlike some provisions of the law such as s 91 of the Child Act 2001, to quote an example. In s 91 of the Child Act 2001, the court for children must consider the options in sub-s (1)(a) and if it is not suitable, goes to (1)(b) and so on and so forth.

[42] My view is that the formula 'shall be punished with imprisonment' does not remove the discretion to apply s 173A of the CPC. And that if a minimum sentence of imprisonment is featured in the provision, the court is obliged to abide by the same but only if the court decides to pass a jail sentence in the first place.

[43] In *Goh Siew Wah v Pendakwa Raya* [2003] MLJU 692; [2004] 1 AMR 616 His Lordship Justice KP Gengadharan has put it succinctly as follows:

Further, the learned magistrate should have taken into account the fact that the charges were not so serious as to warrant five months of incarceration as the charges were also compoundable under the CPC.

[44] There are some differences between the bond under s 294 and one under s 173A of the Criminal Procedure Code.

No	Section 173A	Section 294
1	There is no conviction recorded against the offender	A conviction is recorded against the offender

2	There are alternatives such as: (a) dismissing the charge or complaint after an admonition or a caution to the offender as the court seems fit; or (b) discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order.	The only course of action open to the court is to direct that the offender be released on his entering into a bond with or without sureties and during such period as the court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.
3	Applicable to all except those which has been exempted from the list who are: (a) if the offender is charged with a serious offence; or (b) if the offender is charged with the commission of an act of domestic violence as defined under s 2 of the Domestic Violence Act 1994; (c) anyone charged under any law that excludes the application of s 173A.	Applicable to first offenders unless the first offender falls within the list of: (a) if the offender is charged with a serious offence; or (b) if the offender is charged with the commission of an act of domestic violence as defined under s 2 of the Domestic Violence Act 1994; (c) anyone charged under any law that excludes the application of s 294.

[45] The application of s 294 can be seen in *Raja Izzuddin Shah v Public Prosecutor* [1979] 1 MLJ 270 where His Lordship, Justice Hashim Yeop A Sani states as follows:

> *No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.*

[46] The aforesaid case involved a charge of assaulting a public servant under

s 353 of the Penal Code which was punishable with imprisonment for a term which may extend to two years, or with fine, or with both. The accused in that case (who had pleaded guilty) had been sentenced to three months' imprisonment. The learned judge set aside the sentence and bound over the accused stating that:

> *Considering all the facts before the court I have come to the conclusion that the public interest is in no way better served by committing the appellant to prison. The primary purpose of punishment is reformatory and it is clear in this case that the appellant has realised the fact that notwithstanding his status he is not above the law. He has also clearly stated that he has repented and would not make the same mistake again. Under the circumstances it is my opinion that the public interest is best served by setting aside the sentence of imprisonment and substituting therefore an order under* s 294(i) of the Criminal Procedure Code *that the appellant enter into a bond with one surety in the sum of one thousand dollars for a period of two years and in the meantime to keep the peace and be of good behaviour.*

[47] The effect of such an order can be further seen when it was clearly spelled out in the case of *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68, wherein His Lordship Justice Ong Hock Sim (speaking for the Federal Court) observes as follows:

> *This section vests the court before which a person is convicted with power to suspend sentence for such period as the court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence. Thus, in the instant case, the appellant was in effect given a suspended prison sentence. He has to behave himself for a period of five years. If he behaves himself during the five years period, he would escape punishment for the offence but if he fails to observe the conditions of his bond, he will then be arrested and dealt with for the original offence of rape …*

[48] His Lordship Justice Raja Azlan Shah (as His Majesty then was) stated in *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40 as follows:

> *It is not in doubt that the right measure of punishment for an offence is a matter in which no hard and fast rules can be laid down and it is to be determined by a consideration of a variety of circumstances. In assessing sentence, the primary consideration is the character and magnitude of the offence, but the court cannot lose sight of the proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist in the case.*

[49] I take note that the respondents pleaded guilty before the trial started. Judicial time and expenses were saved. Witnesses are spared of not only trips to the court away from work or other responsibilities but more importantly they are spared of the rigorous cross examination in a criminal trial.

[50] I found in the mitigation that not only the two offenders are young but they were defending their mother from the complainant. Yes, they went overboard but not in the sense of overwhelmingly aggressive but in a manner sufficient to secure safety. It does not fall within private defence when a person goes over the necessary force to secure safety but who are we to say, in the comfort and tranquillity of the courtroom, as against the judgment call of the respondents during the tense moments when the complainant was attacking the mother of the two respondents. On the face of the police report lodged by the respondents' mother, I find sufficient facts to understand that the complainant is not as innocuous as he is made out to be.

[51] The harsh words, threats of violence and inconsiderateness are certainly unwarranted and it amply balanced off the injuries sustained as well as the charge proffered by the public prosecutor against the respondents.

[52] I am of the view that the mitigation forwarded by the learned counsel that the respondents are remorseful and had promised not to repeat the offence again. I also took into account the health conditions as stated in the medical report from a government specialist which the learned deputy in his usual candour, conceded to (and rightfully so) as authentic and true.

[53] There is nothing more than a court can ask for an offender to turn over a new leaf and become a better person.

In *A Child v Public Prosecutor (and another appeal)* [2020] 8 AMR 343, the High Court has this to say, inter alia:

> *Public interest cannot be better served if a child, repentant of his criminal ways, decided to turn over a new leaf, seek a path of reform and come back to society, a useful citizen of the country and a good member of his family. I must say, that this is when the child is deserving and society and the courts must afford him that opportunity.*
>
> *I have no hesitation to do so where the facts and circumstances warrant it.*

[54] I have also read the medical report of the complainant which was tendered and found that the medication prescribed to the complainant which are painkillers namely: (a) paracetamol; and (b) Tramol.

[55] While paracetamol is often called by the brand name 'Panadol', Tramol tablet is a medicine used for the treatment of severe acute pain. It blocks the transmission of pain signals to the brain to lower pain perception. It is also used to treat vomiting. It improves the motility of the stomach and intestines.

[56] Tramol DT 10mg/500mg/50mg tablet can be taken with or without food. The dose and duration will depend on what it is taken for and how well it helps the symptoms. Essentially both are pain killers and not for treatment of injuries per se.

[57] No other medication was prescribed and I am of the view that the injuries sustained may be painful at times, they are not as serious as alleged by the complainant.

CONCLUSION

[58] His Lordship acting Lord President Raja Azlan Shah (as His Majesty then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139 had provided the following guidelines:

> *Is the sentence harsh and manifestly excessive*? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? *I have had the occasion to say elsewhere, that the very concept of judicial discretion involves the right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see Jamieson v Jamieson).*
>
> It is for that reason for some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. *Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.*
>
> *For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardian of the public interest*. (Emphasis added.)

[59] On the similar principle, His Lordship Justice Hashim Yeop A Sani J (as His Lordship then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 expressed the following observations:

In respect of sentencing there can be only general guidelines. No two cases have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.

The principles to be applied in imposing sentence however are the same in every case. *The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence.it is firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence*. (Emphasis added.)

[60] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; 2004 3 CLJ 737, His Lordship Chief Justice Mohamed Dzaiddin, states as follows:

It is of the upmost importance to stress here that the appellate court will not normally alter sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence, see Public Prosecutor v Loo Choon Fatt [1976] 2 MLJ 256. (Emphasis added.)

[61] In *R v Sargeant* [1974] 60 Cr App R 74, the appellant pleaded guilty to affray and was sentenced by the trial judge to two years' imprisonment. On appeal to the Court of Appeal, Lord Justice Lawton stated as follows:

What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing … Finally, there is the principle of rehabilitation. Some 20–25 years ago there was a view abroad, held by many people in executive authority, that short sentences were of little value, because there was not enough time to give in prison the benefit of training. The view is no longer held as firmly as it was. This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging of prison gates which is likely to keep him from crime in the future … In the light of that analysis of the classical principles to be applied in sentencing, what is the result on the facts of this case? The answer is that this sentence is much too long … But we are satisfied, having regard to the facts of this case and the social inquiry and prison reports which the court has been given that we can deal with this case by substituting for the sentence which was passed such a sentence as will enable him to be discharged today. To that extent the appeal is allowed. (Emphasis added.)

[62] After having perused over the appeal record and the grounds of judgment as well as the written submissions and heard parties, I found no appealable error that warranted appellate intervention.

[63] However, I made a slight variation in the order of the learned magistrate in that I imposed a compensation cost of RM50 on each respondent to paid into court and the court will pay the said sum to the complainant on account of the injuries sustained.

[64] Apart from that, I affirmed the decision of the learned magistrate in ordering the two respondents to enter a bond of good behaviour for a term of three years to run from the date of the incident.

[65] Appeal is dismissed. Order by the learned magistrate affirmed with the variation that I have stated above.

Appeal dismissed and decision of magistrate court affirmed.

Reported by Mohd Kamarul Anwar